No. C[illegible]31

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HENRY K. PERSONIUS,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF OF APPELLEE

Upon Appeal from the United States District Court for the District of Idaho, Southern Division.

HON. CHARLES C. CAVANAH, District Judge.

HAWLEY & WORTHWINE,
JESS HAWLEY,
OSCAR W. WORTHWINE,
Attorneys for Appellant,
Residence: Boise, Idaho.

H. E. RAY,
United States Attorney,
RALPH R. BRESHEARS,
W. H. LANGROISE,
SAM S. GRIFFIN,
Assistant U. S. Attorneys,
Attorneys for Appellee,
Residence: Boise, Idaho.

Filed....., 1932

....., Clerk

INDEX

TABLE OF CASES

TABLE OF CASES (CONTINUED)

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HENRY K. PERSONIUS,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF OF APPELLEE

Upon Appeal from the United States District Court for the District of Idaho, Southern Division.

HON. CHARLES C. CAVANAH, District Judge.

HAWLEY & WORTHWINE,
JESS HAWLEY,
OSCAR W. WORTHWINE,
Attorneys for Appellant,
Residence: Boise, Idaho.

H. E. RAY,
United States Attorney,
RALPH R. BRESHEARS,
W. H. LANGROISE,
SAM S. GRIFFIN,
Assistant U. S. Attorneys,
Attorneys for Appellee,
Residence: Boise, Idaho.

Filed....., 1932

....., Clerk

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HENRY K. PERSONIUS,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF OF APPELLEE

Upon Appeal from the United States District Court for the District of Idaho, Southern Division.

STATEMENT OF FACTS.

On December 10, 1931, the plaintiff, appellant herein, filed his complaint against the United States (Tr. 11) seeking recovery upon two policies of war risk term insurance, in the amount of $5,000.00 each, which he alleges were issued to him by the defendant during his military service (Tr. 12, 15).

Plaintiff's first cause of action alleges residence within the jurisdiction of the United States District Court (Tr. 11), that the action is brought under the provisions of the War Risk Insurance Act of October 6, 1917, as amended (Tr. 12), the military service of plaintiff (Tr. 12), the issuance of a $5,000.00 policy of war risk insurance by the defendant in November, 1917, upon which premiums

were paid by the plaintiff to include the month of February, 1920 (Tr. 12), and as a basis for his right to judgment against the United States, Paragraph VI of plaintiff's First Cause of Action contains the following averments:

"VI.

That while this plaintiff was in the military service of the United States as aforesaid and during the World War, and subsequent to the effective date of said insurance, and while said policy was in full force and effect, this plaintiff on October 31, 1918, while engaged in armed combat with the Armed forces of the Central Powers, was wounded by being struck in the left leg by a fragment of high explosive shell, which caused a destruction of bone substance in the tibia and fibula, a contracture of the plantar tendon, a shortening of the left leg, an atrophy of the left leg, an infection of the left leg, and osteomyelitis of the bones of the left leg, and the plaintiff has continuously suffered from and been afflicted with said injuries and diseases from October 31, 1918, and this plaintiff is informed and believes, and upon information and belief alleges the fact to be that as a result of said injuries and diseases the said plaintiff became and was, on October 31, 1918, and during the time said insurance was in full force and effect, totally disabled, and that such total disability was founded upon conditions which made it reasonably

certain that it would continue throughout his life *and that he was totally and permanently disabled from October* 31, 1918, *until January* 1, 1929. *That by reason thereof he became entitled to receive from the defendant the sum of* $28.75 *per month from October* 31, 1918, *to January* 1, 1929."

(Tr. 13, 14)

The jurisdictional allegation of demand by plaintiff, and the subsequent disagreement, is contained in Paragraph VII of plaintiff's first cause of action (Tr. 14).

Plaintiff's second cause of action is identical with his first, with the exception of the fact that it is predicated upon a $5,000.00 policy, alleged to have been issued to the plaintiff by the defendant during the month of February, 1918, premiums having been paid thereon by the plaintiff, according to the allegations of Paragraph II, to include the month of February 1920 (Tr. 15), as in the case of the first policy.

On February 4, 1932, the defendant, appellee herein, filed a demurrer to plaintiff's complaint, paragraph I of which is as follows:

"I.

That the first cause of action of plaintiff's Complaint does not set forth facts sufficient to constitute a cause of action against this defendant, in this: That it appears on the face of the complaint as pleaded in said first cause of action, that the plaintiff is not

now, and that he never has been, permanently and totally disabled, but that the diseases as set forth in Paragraph VI of said first cause of action were only temporarily disabling."

(Tr. 16)

Paragraph II of the demurrer is directed to plaintiff's Second Cause of Action, and differs from Paragraph I in that respect only (Tr. 17).

Plaintiff's demurrer was sustained by the court on May 26, 1932 (Tr. 18) and on June 7, 1932, plaintiff filed his declination to plead further (Tr. 17, 18), whereupon the court on the same date entered an order dismissing plaintiff's complaint (Tr. 18, 19). This action of the court is assigned as error.

POINTS AND AUTHORITIES.

I.

A COMPLAINT WHICH ALLEGES RECOVERY OF AN ABILITY TO FOLLOW CONTINUOUSLY A SUBSTANTIALLY GAINFUL OCCUPATION IS FATALLY DEFECTIVE AND DOES NOT STATE A CAUSE OF ACTION.

U. S. vs. Seattle Title Trust Co. (C. C. A. 9) 53 F. (2d) 435.

U. S. vs. Barker (C. C. A. 9) 36 F. (2d) 556.

U. S. vs. Rice (C. C. A. 9) 47 F. (2d) 749.

40 Stat. 398; Comp. St. 1918, Comp. St. Ann. Supp. 1919 #514 et seq.

40 Stat. 409, Sec. 402.

Bulletin No. 1, Regulations and Procedure, United States Veterans Bureau, Part 2, pages 1233-1237.

White vs. U. S., 270 U. S. 175.

U. S. vs. Law (C. C. A. 9) 299 F. 61.

T. D. 20 W. R., Regulations and Procedure, United States Veterans Bureau, Part 1, page 9.

Sommer vs. Carbon Hill Coal Co. (C. C. A. 9) 89 F. 54, at p. 60.

Miller vs. Prout, 33 Ida. 709; 197 Pac. 1023.

Title 38, U. S. C. A., Sec. 512.

Bulletin No. 3, Regulations and Procedure, United States Veterans Bureau, Part 2, p. 1241, at p. 1265.

Bulletin No. 3, Regulations and Procedure, United States Veterans Bureau, Part 2, p. 1258-1259.

Regulation 57, Regulations & Procedure, United States Veterans Bureau, Part 1, p. 54.

Regulation 57, Regulations & Procedure, United States Veterans Bureau, Part 1, p. 54, at p. 55.

U. S. vs. Fly (C. C. A. 8), 58 F. (2d) 217, at pp. 218, 219.

U. S. vs. Crume (C. C. A. 5) 54 F. (2d) 556, at p. 558.

Regulation 5-A, Regulations and Procedure, United States Veterans Bureau, Part 1, page 76.

Regulation No. 40, Regulations and Procedure, United States Veterans Bureau, Part 1, page 112.

Regulation No. 77, Regulations and Procedure, United States Veterans Bureau, Part 1, page 135.

Title 38, U. S. C. A., Sec. 512b.

Bean vs. U. S. (D. C. Kan.) 7 F. (2d) 393, at p. 396.

Birmingham vs. U. S. (C. C. A. 8) 4 F. (2d) 508, at p. 509.

U. S. vs. Lyke (C. C. A. 9) 19 F. (2d) 876.

U. S. vs. Cox (C. C. A. 5) 19 F. (2d) 944.

ARGUMENT.

I.

A COMPLAINT WHICH ALLEGES RECOVERY OF AN ABILITY TO FOLLOW CONTINUOUSLY A SUBSTANTIALLY GAINFUL OCCUPATION IS FATALLY DEFECTIVE AND DOES NOT STATE A CAUSE OF ACTION.

The sole question involved in this appeal is whether or not the appellant has, by his complaint, set forth facts sufficient to constitute a cause of action against the defendant, appellee. The defendant raised the question by demurrer, taking the position that the averments of the complaint plead a total condition which was only temporary. The court was of the same opinion, and his action in sustaining the demurrer, and subsequently dismissing

the action, is assigned as error. The question is one of law, and can easily be discussed under one proposition.

The plaintiff, by his complaint, has limited the duration and continuance of his alleged total disability to the period between October 31, 1918 and January 1, 1929, as is clearly apparent from a reading of the last six lines of Paragraph VI, which are as follows:

> *"and that he was totally and permanently disabled from October* 31, 1918, *until January* 1, 1929. *That by reason thereof he became entitled to receive from the defendant the sum of* $28.75 *per month from October* 31, 1918, *to January* 1, 1929."

It is not the position, or claim, of the plaintiff that he has been permanently and totally disabled since January 1, 1929, or that his complaint alleges, or infers, such to be the fact. On the contrary, he admits that on said date of January 1, 1929, he recovered from his total disability (Appellant's Brief 9) and he specifically states in his Brief that he "did" on said date "actually recover the ability to follow a substantially gainful occupation" (Appellant's Brief 32).

In other words, it is the position of the plaintiff, that even though he has pleaded a recovery from his total disability, almost two years prior to the filing of the complaint, that proper construction of the policies permits his recovery from the defendant at the rate of $57.50 per month beginning on October 31, 1918 and ending January 1, 1929, and that a complaint which alleges permanent and total disability between those dates is sufficient.

According to the statements contained in plaintiff's brief, he is now, and ever since January 1, 1929, has been suffering from a permanent disability, which is only partially disabling (Appellant's Brief 9, 17, 21), and which is not sufficient to prevent him from following continuously a substantially gainful occupation (Appellant's Brief 32).

That the insured cannot recover if he is only partially disabled, though the condition may be permanent, is so well settled that it requires no argument.

U. S. vs. Seattle Title Trust Co. (C. C. A. 9) 53 F. (2d) 435.
U. S. vs. Barker (C. C. A. 9) 36 F. (2d) 556.
U. S. vs. Rice (C. C. A. 9) 47 F. (2d) 749.

War Risk Insurance policies were issued under the authority of the act amending an act entitled "An Act to Authorize the Establishment of a Bureau of War Risk Insurance in the Treasury Department," approved September 2, 1914, and for other purposes, approved October 6, 1917. (40 Stat. 398; Comp. St. 1918, Comp. St. Ann. Supp. 1919 #514 et seq). Article 4, commencing with Section 400 of the Act (40 Stat. 409) deals with insurance and Section 402 provides, in part:

> "It shall be payable only to a spouse, child, grandchild, parent, brother or sister, *and also during total and permanent disability to the injured person,* or to any or all of them."
>
> (italics ours)

In exercise of the power conferred upon him by the foregoing Act, and following the express direction of Congress, to the effect that he should publish the terms and conditions of insurance contracts, to be issued pursuant to the statute, the Director of the Bureau of War Risk Insurance, under the direction of the Secretary of the Treasury, published, and promulgated, Bulletin No. 1, on October 15, 1917 (Regulations and Procedure United States Veterans Bureau, Part 2, page 1233-1237) which Bulletin contained the terms, conditions, and provisions of all soldiers' and sailors' insurance.

White vs. U. S., 270 U. S. 175.

U. S. vs. Law (C. C. A. 9) 299 F. 61.

The policy provided, among other things, that the insurance should be payable—

> "To the insured, if he/she, *while this insurance is in force, shall become totally and permanently disabled,* commencing with such disability as established by the award of the Director of the bureau *and continuing during such disability;*" (Bulletin No. 1. supra, p. 1235).
>
> (italics ours).

On March 9, 1918, the Director of the Bureau of War Risk Insurance, published T. D. 20 W. R., which defines total and permanent disability (Regulations and Procedure, U. S. Veterans Bureau, Part 1, page 9).

Plaintiff's proposition of law No. I, and the discussion thereunder, is directed to the rule of liberality in the construction of pleadings, when attacked by demurrer.

In answer to the argument advanced by plaintiff, we have but to point out the obvious, and fundamental rule, that when a pleading does not allege facts, which will, under the law, entitle the party to relief, or recovery, it is, to use the language of this Court, "so fatally defective that, taking all the facts to be admitted, the Court can say they furnish no cause of action whatever." Sommer vs. Carbon Hill Coal Co. (C. C. A. 9) 89 F. 54 at page 60.

Miller vs. Prout, 33 Ida. 709; 197 Pac. 1023.

In our view of the matter, there is an entire lack of essential allegations, in plaintiff's complaint, to sustain a judgment in his favor.

The definition of total and permanent disability, as contained in T. D. 20 W. R., supra, and approved by the courts, contains two conditions which must be co-existent, before an insured is entitled to the disability benefits of his policy. He must be suffering from an impairment of mind or body, which renders it impossible for him to follow continuously a substantially gainful occupation, *and standing at that point,* the total condition shall be deemed to be permanent, whenever it is founded upon conditions which render it *reasonably* certain that it will continue throughout the life of the person suffering from it.

Manifestly, it is humanly impossible for any physician, or other person, to foretell, with positive certainty, that a physical condition, which he finds at any particular time, has reached a stationary level and will continue permanently to be totally disabling, if it appears to be totally disabling at the time of his examination. For this reason,

the Director of the Bureau of War Risk Insurance wisely provided, in the definition, for a discontinuance of the payment of installments, and a resumption of premium payments, in the event that the insured recovers his ability to follow continuously a substantially gainful occupation.

If, during the life of his policy, an insured person is found to be totally disabled, and looking into the future, scientific principles, reasonably applied, make it probable that the condition will continue through life, he is given the benefit of the provision maturing the policy and is paid by the Government under his contract. The definition of permanent and total disability has been liberally construed by the courts to the end that disability payments on a policy will be initiated when such a situation arises. Congress recognized that medicine is not an exact science, and that nothing is certain, in life, when the saving clause contained in Sec. 512, Title 38, U. S. C. A. (Appellant5s Brief 25, 26) was enacted.

The provision in the statute, above referred to, and contained in the definition, for the discontinuance of installments and the resumption of premium payments, in the event of recovery, is the answer by Congress, and by the Bureau of War Risk Insurance to the question propounded to Judge Mack, at the Conference of officers and enlisted men of the Army and Navy held in Washington, D. C. on October 10-18, 1917, inclusive, which question is quoted in appellant's Brief at pages 28 and 29, and is as follows:

> "A MEMBER: Your statement, Judge, of total and permanent disability—suppose a man is pro-

nounced totally and permanently disabled by a board of physicians, and thereafter it develops that he has recovered somewhat; would he still be considered under that condition, or would that word 'permanent' come in; and if so, what is the affect?

"JUDGE MACK: That is a problem.

"A MEMBER: That's got to be settled.

"JUDGE MACK: *And I think the bureau will settle the problem liberally.*"

(italics ours)

Bulletin No. 3, Regulations and Procedure, United States Veterans Bureau, Part 2, p. 1241, at p. 1265.

The explanation of the War Risk Insurance Act by Judge Mack, as set forth in Bulletin No. 3, supra, was fully approved, and adopted by the Bureau of War Risk Insurance, and plaintiff quotes in his brief the statement of the Director to this effect. (Appellant's Brief 27).

One may look into the future and venture the opinion, that a total disability is *reasonably* certain to continue, and one may also look into the past, and say, based upon the assumed fact that total disability existed at a given time, and taking into consideration subsequent events, *and a present condition which is consistent* with a conclusion as to the ultimate fact, that a total and permanent disability has existed throughout the period.

In this case, however, it is not possible for any person to venture an opinion as to permanent and total disability.

The plaintiff has pleaded and admitted a recovery which antedates by almost two years the filing of his complaint. He was not permanently and totally disabled from October 31, 1918, until January 1, 1929, but if the allegations of his complaint are taken as true, for the purpose of deciding the question raised by demurrer, his total condition was only temporary. That he has pleaded a chronic condition, as stated in his Brief, which is reasonably certain to continue throughout his life, is not material.

The plaintiff has asked, in his Brief (Appellant's Brief 24) why the statute provides that total and permanent disability benefits shall be payable to the injured person *"during total and permanent disability,"* if it is not meant by that phrase that he can now, though recovered from his total and permanent condition, receive the benefits of his policy during the period that he alleges he was totally disabled, and he argues that Congress did not intend permanent, as used in the definition, to mean everlasting and forever.

The statute, Sec. 402 of the Act (40 Stat. 409), provides that the insurance shall be payable in 240 equal monthly installments, and the policy as set forth in Bulletin No. 1, supra, at page 1235, provides:

> "To the beneficiary or beneficiaries hereinafter designated, commencing upon the death of the insured, while the insurance is in force, and (except as otherwise provided) continuing for 240 months if no installments have been paid for total and permanent

disability or if any such installments have been paid, then for a number of months sufficient to make 240 in all;"

As will be noted by quotations, hereinbefore set out, the statute contains the expression, with respect to the payment of permanent and total disability benefits to the insured, "*and also during total and permanent disability to the injured person*," while the policy itself, in connection with this feature, uses the words "*and continuing during such disability.*"

These words in the statute, and in the policy, guarantee that a person becoming permanently and totally disabled, will continue to receive disability benefits as provided by the policy, as long as he lives, or as long as permanent and total disability continues, even though such monthly payments may exceed 240, as in the case of maturity by reason of death. A beneficiary of a war risk insurance policy cannot, under the statute, receive more than 240 equal monthly installments, and if an insured dies, after his policy has been matured by reason of permanent and total disability, the beneficiary will receive only the difference between the installments paid the insured, and the total number of 240. However, a man properly determined to be permanently and totally disabled, while his contract is in force, is entitled to, and will receive his monthly installments, as long as the condition endures, notwithstanding the limit to the number of installments to be paid for other contingencies. This is the explanation contained in Bul-

letin No. 3, supra, cited by appellant (Appellant's Brief 28, 29), wherein Judge Mack says at pages 1258-1259:

> "Now, in its solicitude for the men and for the families, and acting—and properly acting—in a somewhat paternal manner, the Government has provided that you can not get this insurance paid out in a lump sum, and that your family can not get this insurance paid out in a lump sum. It is not only free from creditors, but it is going to be paid out only in monthly installments over a period of 20 years, which means 240 monthly installments. *If, however, you become totally disabled and the total disability continues more than 20 years, the same monthly installments will be kept up for you as long as the disability continues.*"
>
> (italics ours)

This, we believe, fully answers appellant's query.

Appellant has cited and quoted from Regulation No. 57, Regulations & Procedure, United States Veterans Bureau, Part I, p. 54, for the purpose of arguing that one having a continuous total disability for a period of six months, is regarded by the Bureau as being entitled to the benefits of his policy. This regulation was promulgated in furtherance of the liberal policy to make it possible for a man to receive the total disability benefits of his contract, at the earliest possible moment, consistent with the statute and the policy itself. The regulation provides for a presumption of total and permanent disability where an

insured has been in a hospital or asylum for six months or more, or carries a rating of total or total temporary for a period of six months or more, and is unable to follow continuously a substantially gainful occupation during such six months, and in addition, at the time of the medical examination, which is a condition precedent to the finding of total and permanent disability, under the regulation, shall be found to be in such a physical or mental condition, as to require further hospitalization, or otherwise unable to collow continuously a substantially gainful occupation. *However,* and this was overlooked by appellant in his Brief, the regulation provides further:

> "*Before the disabled person shall be rated totally and permanently disabled under the preceding paragraph, a medical examination shall be conducted for the purpose of ascertaining his or her true physical and mental condition, and in addition all facts as to his or her ability to engage continuously in a substantially gainful occupation shall be procured.*"
>
> (italics ours)
>
> Regulation 57, Regulations and Procedure, United States Veterans Bureau, Part I, p. 54, at p. 55.

It will thus be noted, that it has always been the policy of the Bureau, to grant total and permanent disability benefits, *whenever total disability "is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it."*

If, *at the date the disability is determined to be total*, a prognosis based upon reason, makes probable the continuance of the condition at a stationary level, then, and then only, are benefits payable.

While no decision is to be found in which this precise point is raised, all of the decided cases on war risk insurance hold that a man must be unable to follow continuously a substantially gainful occupation, before he is entitled to recover on his policy, and this without jeopardy to his life and health.

In the case of U. S. vs. Fly, decided by the Eighth Circuit Court of Appeals and reported in 58 F. (2d) at page 217, the evidence presents a picture of inaptitude, and physical inability to follow continuously a substantially gainful occupation from date of discharge from the Army until April 1929, to such an extent, that the Circuit Court would have affirmed the action of the trial court, in letting the case go to the jury, if it had not been for the fact that in April 1929, plaintiff became employed at a job which continued for 18 months. With respect to plaintiff's rights, as affected by his ability to work at the time of trial, the court says:

> "There is conflict in the evidence as to appellee's condition and actions up to his final return to Marshfield in April, 1929. If the matter stopped there we would hesitate, giving him every advantage in the evidence, to say there was no substantial evidence to sustain the verdict because, taking that view of the evidence, it might be said that he had repeatedly tried

various ways of making a living and had found himself unable to continue in any of them. But the matter does not stop there. *This brings us to the fact which is determinative.*

"That fact is that for eighteen months before and at the time of trial he had been continuously employed by W. T. McMahan, at Marshfield, as a helper and in general work around his undertaking establishment *at a normal wage.'"* (at p. 218)

It is quite evident that appellee has been and is under a considerable handicap because of his condtion brought about by his injuries, and is suffering a decided disability which may be permanent. *But how can this court say that such disability is total, to the extent that it prevents him from 'following continuously any substantially gainful occupation,' when the undisputed evidence of the appellee, his wife, and his employer agree that he was at the time of trial and for eighteen months had been steadily employed at normal wages and had, in the words of his employer, 'performed his work there with me satisfactorily,'* with absences of only about a week, caused by sickness? The evident injury to appellee and the highly meritorious service origin of this injury have inclined us to view this record with lively sympathy; but our duty is to take the evidence as we find it and to enforce the rights of these parties as defined by their contract. That contract required total injury before recovery could be lawfully had. This evidence clear-

ly and unmistakably shows no such total injury. The motion for an instructed verdict should have been sustained." (at p. 219)

(italics ours)

The Fifth Circuit Court of Appeals has also said that total and permanent disability must be continuing, to entitle an insured to recover under one of these policies.

> *"Further, this evidence must not merely show that he was at the time of his discharge totally disabled, but that he has continued and will continue to be so,* not as the result of successive maladies making their onset from time to time, but as the result of the same malady, which then totally disabling, has continued and will continue permanently to be so."
>
> U. S. v. Crume (C. C. A. 5), 54 F. (2d) 556, at page 558.
>
> (italics ours)

It is clear from the foregoing authorities, that a pleading which alleges recovery from total disability almost two years prior to the date of filing, is wholly lacking in allegations essential to support a judgment.

Appellant's position is entirely inconsistent with the law of war risk insurance, as it is written in the innumerable decisions of appellate courts. If this plaintiff had alleged in his complaint, that he is now, and ever since the date of October 31, 1918, which was within the life of his policy, has been totally and permanently disabled, by reason of the diseases, disabilities, and injuries enumerated in his

complaint, and if, during the actual trial of the case it had developed that since January 1, 1929, the plaintiff has been able to follow continuously a substantially gainful occupation, without impairment to his health, *it would have been the duty of the court to direct a verdict for the government.* Earning capacity, employability, the ability to follow an occupation in the normal way, without serious detriment to health, is the test, and when the proof develops the ability of the insured to follow an occupation and obtain a gainful wage, the jury should be instructed to return a verdict for the government.

Where is the distinction between that case wherein it develops, as a matter of proof, at trial, that the insured has recovered his ability to work, and this case, wherein it is admitted by the pleadings that the plaintiff is no longer totally disabled. In one case the proof is fatal to his claim, in the other the admission bars any right to recovery.

In some of the decided cases, it appears that the proof has establishd an ability to follow continuously a substantially gainful occupation immediately upon the discharge of the insured from military service; in others, the proof develops such a capacity at a much later date, but in all such cases, the appellate courts have held, without exception, that recovery cannot be had by the insured.

To adopt appellant's theory is to strip the word "permanent" of any meaning whatever, and to classify it as surplusage in the definition and in the statute. If Congress had intended that an insured could receive disability

benefits upon his policy by reason of total disability, which need not be permanent, it would have so expressed itself in the statute, and the Bureau would have expressly provided in the definition, or by regulation, that installments would become due upon the showing of a total disability.

Provision was made by the Bureau, by Regulation 5-A, promulgated June 26, 1922 (Regulations and Procedure, U. S. V. B., Part 1, page 76) for a waiver of premiums due upon renewable term insurance, and United States Government life insurance (converted insurance), pursuant to application therefor by the insured, in the case of and during temporary total disability. The portions of that regulation applicable here are as follows:

> "1. Subject to the conditions hereinafter set out, the yearly renewable term insurance and United States Government life insurance (converted insurance) shall be deemed not to lapse by reason of the nonpayment of premiums on the due date thereof, and unless paid by the insured, payment of such premiums on the due date thereof shall be waived, in the cases of the following persons: (a) Those who are confined in a hospital as patients of the United States Veterans' Bureau for a compensable disability during the period while so confined; (b) *those who are rated temporarily totally disabled by reason of an injury or disease entitling them to compensation, during the period of such total disability and while they are so rated.*"
>
> (italics ours)

The same provision is to be found in Regulation No. 40 (Regulations and Procedure, U. S. V. B., Part 1, page 112), which amends Regulation 5-A, and Regulation No. 77, September 3, 1924 (Regulations and Procedure, U. S. V. B., Part 1, p. 135), which amends and supersedes Regulation No. 40. In other words, during temporary total disability, the insured could, by complying with the regulations, have his premium waived, but only during total and permanent disability could he receive the benefits of his policy in the form of monthly installments to be paid, as in the case of maturity by death.

Furthermore, Congress, on July 3, 1930, enacted a total disability statute for United States Government life insurance (converted insurance) which makes the distinction between temporary total and permanent total disability clear and unequivocal. This statute provides in part:

> "The director is hereby authorized and directed to include in United States Government life (converted) insurance policies provision whereby an insured, who is totally disabled as a result of disease or injury for a period of four consecutive months or more before attaining the age of sixty-five years and before default in payment of any premium, shall be paid disability benefits at the rate of $5.75 monthly for each $1,000 of converted insurance in force when total disability benefits become payable.
>
> *The amount of such monthly payment under the provisions of this section shall not be reduced because of payment of permanent and total disability*

benefits under the United States Government life (converted) insurance policy. Such payments shall be effective as of the first day of the fifth consecutive month, *and shall be made monthly during the continuance of such total disability. Such payments shall be concurrent with or independent of permanent total disability benefits under the United States Government life (converted) insurance policy.* In addition to the monthly disability benefits the payment of premiums on the United States Government life (converted) insurance policy and for the total disability benefits authorized by this section shall be waived during the continuance of such total disability. Regulations shall provide for re-examinations of beneficiaries under this section; *and, in the event that it is found that an insured is no longer totally disabled, the waiver of premiums and payment of benefits shall cease and the United States Government Life (converted) insurance policy, including the total disability provision authorized by this section, may be continued by payment of premiums as provided in said policy* and *the total disability provision authorized by this section.* Neither the dividends nor the amount payable in any settlement under any United States Government Life (converted) insurance policy shall be decreased because of disability benefits granted under the provisions of this section. The payment of total disability benefits *shall not prejudice the right of any insured, who is totally and permanently disabled, to*

total permanent disability benefits under his United States Government Life (converted) insurance policy;"

(italics ours)

Title 38, U. S. C. A., Sec. 512b.

The foregoing section of the statute proves beyond peradventure of doubt, that Congress had in mind very definitely a difference between a total disability which was only temporary and a total disability of a permanent nature. As in many commercial policies, such as Penn Mutual Life Insurance Company vs. Milton, cited by Appellant (Brief 36-38), it is provided by this late statute, that proof of the continuance of the condition for a comparatively short time, in this case four months, will entitle the insured to total disability benefits during the existence of the condition, premiums being waived coincident therewith. It is definitely provided by the statute that total and permanent benefits are a distinct benefit based upon entirely different considerations.

In other words, when Sec. 512b, above quoted, was, on July 3, 1930, added to Section 512, Title 38, U. S. C. A., as enacted June 7, 1924, Congress was convinced that it would be necessary to specifically add legislation to that already in existence, before an insured could receive any benefits for a total disability which could not reasonably be determined as permanent by looking into the future from that point. If Congress did not construe total and permanent disability as we construe it herein, why was it necessary to enact Section 512b?

The appellant has cited several state cases dealing with commercial insurance, as authority for his position. If we assume, for the sake of argument, that the cases cited, correctly state the law of the jurisdictions in which they arose, still they have no application here, and the principles announced therein are not tenable as aiding in the construction of a war risk insurance policy issued by the government.

As to the application of principles of law governing commercial insurance, District Judge Pollock of the District Court of Kansas, First Division, has the following to say:

> "*and the authorities being uniform to the effect that 'war risk insurance is a special statutory kind of insurance, and contracts issued thereunder are not to be interpreted and construed according to the principles of law governing accident insurance, or other contracts of insurance'*,"
>
> (italics ours)
>
> Bean vs. U. S. 7 F. (2d) 393, at p. 396.

The Eighth Circuit Court of Appeals classifies war risk insurance as a special kind of insurance, not governed by the same principles as ordinary insurance, in the following language:

> "The government in devising and putting in effect its plan of war risk insurance did not enter the field of business in the accepted sense for commercial purposes and pecuniary gain, and therefore does not

stand in the same relation to the insured as do ordinary insurance companies. It can be held only to the extent that it has expressly consented to be held upon contracts of this nature."

Birmingham v. U. S. (C. C. A. 8), 4 F. (2d) 508, at p. 509.

This court has, in very strong language, distinguished war risk insurance contracts from commercial policies, and held that the legal principles governing ordinary insurance are not relevant in the construction of a government policy.

"We have considered the cited cases which involve the interpretation of accident insurance contracts. They are not controlling, for war risk insurance is of a materially different character, being in large part based upon considerations other than those which enter into a purely business relationship of accident indemnity contracts. The distinction has been recognized by the Comptroller of the Treasury, who has pointed out that war risk insurance established by the statute is not an out and out contract of insurance on an ordinary business basis, nor yet a pension, but that 'it partakes of the nature of both.' Decision of Comptroller, July 5, 1919; Caserello v. United States (D. C.) 271 Fed. 488. A liberal construction of the statute should be adopted, but, of course, the courts always are bound by the limitations of the statute and by regulations properly made by the director,

pursuant to the authority conferred by the law. Helmholz v. Horst (C. C. A.) 294 Fed. 417."

(italics ours)

U. S. vs. Law, 299 F. 61, at p. 65 (reversed on other grounds, 266 U. S. 494)

See also:

U. S. vs. Lyke (C. C. A. 9) 19 F. (2d) 876.

White vs. U. S., 270 U. S. 175.

U. S. vs. Cox (C. C. A. 5) 24 F. (2d) 944.

Then, too, it appears, that the contract, in the case of Penn Mutual Life Insurance Company vs. Milton, 127 S. E. 140, cited by appellant, provides definitely that payment of total disability benefits shall become due upon a showing that total disability has continued for 60 days, and this was the controlling reason for the decision of the court, to the effect that a disability which lasted for only 16 months should be construed as permanent, within the meaning of the policy. This feature of the policy alone sets it apart from war risk insurance and makes the case inapplicable here.

In the Wenstrom vs. Aetna Life Insurance Company case, 215 N. W. 93, cited by appellant, the plaintiff therein had not recovered from his alleged disability at the time of trial. In fact, he was on crutches, and the principal question decided in the case was whether or not there was

sufficient evidence of present total and permanent disability to go to the jury. Other questions decided by the court related to notice to the insurance company, and the right of the insured to recover premiums. Appellant cannot, therefore, argue that this case is, in any respect, authority for his position in the instant case.

Aside from the fact, then, that cases relating to ordinary commercial insurance, are not applicable in the construction of government insurance policies, both of the cases cited by the appellant, are easily distinguished from, and hopelessly at variance with, the facts in our case.

The appellant suggests in his brief that a denial of his position will result in discrimination (Appellant's Brief 33), and by quoting from a letter written by W. G. McAdoo in July, 1917 (Appellant's Brief, 23) allows the question of sympathy and sentiment to creep into his argument of a purely legal proposition. It is not discrimination, to say to a man that has fully recovered from an inability to follow an occupation continuously, that he cannot obtain judgment for something that he never had. To adopt appellant's theory would throw open the doors to thousands of men who served in the military forces of the United States, and who are now clearly able to pursue their vocations, though they may, in the past, have suffered from some malady, which then totally disabled

them. Compensation for disability was provided by Congress at the same time that provision was made for insurance, and it was not intended that one should be substituted for the other.

Respectfully,

H. E. RAY,
United States Attorney for the
District of Idaho;

RALPH R. BRESHEARS,

SAM S. GRIFFIN,

WILLIAM H. LANGROISE,
Assistant U. S. Attorneys for
the District of Idaho,

Attorneys for Defendant,
Appellee.